

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

SANDRA WILL CARRADINE,  
  
Plaintiff and Appellant,

v.

WILLAIM COWELL, et al.,  
  
Defendants and Respondents.

2d Civil No. B210910  
(Super. Ct. No. 1245444)  
(Santa Barbara County)

Sandra Will Carradine purchased a house from William and Mary Cowell in June 1999. Her complaint, filed in June 2007, alleges that they breached the real estate purchase contract by failing to disclose that they substantially modified the house and made other improvements on the property without obtaining building permits and that they built a fence that encroaches on property owned by a homeowners' association. After a court trial, judgment was entered in favor of the Cowells. Carradine appeals, contending the trial court erred when it found that her claim was barred by the statute of limitations, when it found that respondents did not breach the contract, when it excluded evidence of their knowledge of undisclosed facts, and when it awarded them attorney's fees of \$122,100. We conclude the complaint was time barred and that the fee award is not an abuse of discretion. Accordingly, we affirm.

### *Facts*

The property at issue is located in the Rincon Point neighborhood of Carpinteria and features a main house, originally built in 1928, a detached garage now converted into an apartment, and a separate workshop or tool shed. Respondents, who are in their 90s, owned the property from 1973 until they sold it to appellant on June 11, 1999.

In March 2003, the Ventura County Resource Management Agency's Division of Building and Safety (Building and Safety) received a complaint that construction was occurring on the property without the proper permits. A code enforcement officer conducted an inspection on May 12, 2003, and issued a notice of violation identifying seven modifications made without required permits. Appellant received the notice on June 10, 2003. She spent the next four years embroiled in disputes with Building and Safety over the required permits and repairs. On June 8, 2007, appellant filed her complaint against respondents, alleging that they breached the June 1999 contract and committed fraud when they failed to disclose the non-permitted modifications and a fence that does not follow the property line.<sup>1</sup>

### *Contract Terms*

The parties' real estate purchase contract provides that the property is sold "as is," but also states that respondents "remain obligated to disclose known material defects and to make other disclosures required by law." It further provides that respondents "shall promptly disclose to [appellant] any improvements, additions, alterations, or repairs ('Repairs') made by [respondents] or known to [respondents] to have been [made] without required governmental permits, final inspections, and approvals." The contract "strongly advised" appellant, as buyer, to investigate "ALL MATTERS AFFECTING THE VALUE OR DESIRABILITY OF THE PROPERTY," including "Possible absence of required governmental permits . . . ." A written

---

<sup>1</sup> The trial court granted respondents' motion for summary adjudication on the fraud cause of action, concluding that it was barred by the three-year statute of limitations. (Code Civ. Proc., § 338.)

addendum to the contract states that appellant's "willingness to complete the transaction . . . [is] contingent upon [her] review and approval" of respondents' "written disclosure of all adverse facts known by [respondents] relating in any way to the Property . . . ."

### *Respondents' Disclosures*

The first time appellant visited the property, respondents' adult son, Stanley Cowell, gave her a tour, pointing out the many improvements he and his father made to it over the years. Their improvements and modifications included: building a fence along the north side of the property, building the tool shed and providing it with electricity, expanding the apartment side of the garage by moving a wall and making other improvements, adding skylights, windows and doors at various places, enclosing one porch to make a breakfast nook and another to make a bedroom, installing wall heaters in several rooms, building a deck, and modifying the ceiling in the kitchen. Stanley Cowell did not recall telling appellant anything about whether they obtained permits for this work.<sup>2</sup> Appellant had no discussions with respondents.

Before the close of escrow, respondents provided a written disclosure statement to appellant. This document identifies an encroachment by neighbors at one end of the property and also notes that the garage conversion was "not permitted as such and that area was modified without permits."

Appellants and respondents were represented in the transaction by the same real estate agent. She provided additional written disclosures to appellant. In one document, the agent stated: "I understand there is no permit for the garage conversion into a 'guest apartment,' and that such use would not be permitted by the appropriate authorities." She also stated that she did not know whether "the workshop is permitted and whether such a structure would be permitted by the appropriate authorities." In another, longer document, the agent noted that Building and Safety

---

<sup>2</sup> Appellant denied that Stanley Cowell told her about the most significant modifications. The trial court found her testimony was not credible and relied instead on Mr. Cowell's version of the events.

had no record of a building permit for any construction on the site, but that the house was built in 1928, before such records were maintained. In the county assessor's office, she found building permits that were issued to a prior owner in 1960, for the construction of a "porch and bath" and for some rewiring. A permit for roof work was issued in the 1990s, but then canceled by respondents or their contractor. The agent stated that she could not determine which portions of the current house were described in the permits, but she believed the bedrooms were all permitted. She also gave appellant a copy of a home inspection report prepared for another potential buyer.

Appellant reviewed all of these documents with her attorney before completing her purchase of the property. She took no other action to investigate any of the items included in the disclosure documents.

After she bought the property, appellant also made modifications to it. She moved a wall in the breakfast nook, expanded the tool shed and upgraded its electricity, moved a washer and dryer and changed its plumbing, added a deck, added or replaced windows in several locations, changed a window to a set of French doors, altered the landscaping, and built an outdoor gazebo. Appellant did not obtain permits for any of these modifications.

### *The Fence*

Respondents had the property surveyed in 1974, after their neighbors, the Conrads, built over the Cowells' property line. Within a couple of years, respondents also built a fence along the north side of the property. They "eyeballed" the fence so that it ran parallel to an existing road, but did not refer to a map or to the survey to make sure that it followed their property line. In fact, the fence encroaches on property owned by the Rincon Point Property Owner's Association. Appellant's complaint alleges that respondents breached the contract by failing to disclose this fact.<sup>3</sup>

---

<sup>3</sup> Respondents' written disclosure statement identified an encroachment by the Conrads' along a different portion of the property line.

In April 2000, appellant became involved in a dispute with her neighbors and with the property owners' association concerning some shrubs located in the area between her property line and the fence. The property owners' association decided that the shrubs were located on its property and that they would be trimmed to preserve the neighbors' views. Within a few weeks of that decision, the association provided appellant's attorney with a map showing the relevant property line. In 2001, the association commissioned a survey of the same area. Appellant contacted the surveyor in October 2002 and obtained a copy of the survey a few days later.

### *Discussion*

An action for the breach of a written contract must be commenced within four years after the cause of action accrues. (Code Civ. Proc., §§ 312, 337.) As a general rule, a cause of action for breach of contract accrues, "when all of the elements of the cause of action have occurred . . . ." (*Armstrong Petroleum Corp. v. Tri-Valley Oil & Gas Co.* (2004) 116 Cal.App.4th 1375, 1388.) Damage to the plaintiff is an element of the cause of action; plaintiff's knowledge of the damage is not. (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 186 ["The plaintiff's ignorance of the cause of action . . . does not toll the statute."]; *Spinks v. Equity Residential Briarwood Apartments* (2009) 171 Cal.App.4th 1004, 1031.)

In contract cases involving a fiduciary relationship or other extraordinary circumstances, courts have applied the "discovery rule," which tolls the statute of limitations until the plaintiff discovers, or could have discovered through reasonable diligence, both the breach and the resulting injury or damage. (*Angeles Chemical Co. v. Spencer & Jones* (1996) 44 Cal.App.4th 112, 119.) Application of the discovery rule is particularly appropriate where a breach of contract occurs "in secret" and the harm flowing from it "will not be reasonably discoverable by plaintiffs until a future time." (*April Enterprises Inc. v. KTTV* (1983) 147 Cal.App.3d 805, 832.) For example, in *Gryczman v. 4550 Pico Partners, Inc.* (2003) 107 Cal.App.4th 1, the parties' written contract gave plaintiff both a right of first refusal to purchase defendant's real property, and a right to notice of any bona fide offer defendant

received and was willing to accept. Defendant accepted an offer and sold the property to a third party without notifying plaintiff, who discovered the sale by chance more than four years later. The Court of Appeal held plaintiff's breach of contract claim was subject to the discovery rule and therefore not barred by the statute of limitations. "[T]he act causing the injury would have been 'difficult for the plaintiff to detect' because, as previously noted, the failure to give plaintiff notice of the happening of a certain event is both the act causing the injury and the act that caused plaintiff not to discover the injury." (*Id.* at p. 6.)

Here, the trial court made the factual finding that, on the day appellant acquired the property, she knew respondents had modified it without obtaining the necessary permits. It further found that no fiduciary relationship or other unusual facts existed to justify application of the discovery. Finally, it found that appellant's complaint was untimely, even if the discovery rule applied, because she did not exercise reasonable diligence to discover whether respondents had fully disclosed everything they knew about the fence and the non-permitted modifications. These findings are supported by substantial evidence.

Before the sale closed, appellant's real estate agent informed her that neither Building and Safety nor the assessor's office had a record of any building permit issued for the property during respondents' ownership. Permits were issued in 1960 for a "porch and bath," and for electrical work. There was also a permit application made in 1969, "when the owner was Nancy Dunn . . . [,]" and not respondents. Appellant also knew that respondents made extensive improvements to the property themselves because Stanley Cowell showed her those improvements on her first visit. Respondents' written disclosure, however, identified only the garage conversion as having been made without necessary permits.

Appellant knew that respondents made many improvements besides the garage conversion and she knew that no building permits were issued while they owned the property. A reasonable person would conclude from this information that respondents' written disclosure was incomplete. Thus, as the trial court found,

appellant knew or should have known on the day she acquired the property that it included modifications made without permits that were not identified in respondents' written disclosure. Her cause of action for breach of the contract's disclosure provisions accrued on that date. Because her complaint was filed more than four years later, it was barred by the statute of limitations.

Appellant contends that, even if she was aware of the incomplete disclosure at some earlier time, she was not damaged by the breach of contract until June 2003 when Building and Safety notified her that she would be required to correct the building code violations. We are not persuaded. If respondents' incomplete disclosure amounted to a breach of contract, the breach caused damage to appellant as soon as she acquired the property. At that point, she was subject to an enforcement action by Building and Safety and could have been ordered at any time to incur the cost of remedying building code violations. (See, e.g., *Hawthorne Savings & Loan Assn. v. City of Signal Hill* (1993) 19 Cal.App.4th 148 [bank acquiring dilapidated apartment building in foreclosure may be ordered, after reasonable notice, to repair building code violations or demolish building]; Health & Saf. Code, §§ 17980, subd. (b), 17992.) Certainly, that potential liability became a reality when Building and Safety served its notice of violation, but it had existed from the moment appellant signed the contract. Thus, appellant's cause of action for breach of contract accrued on the closing date, June 11, 1999.

Appellant's claim relating to the fence is also time-barred. She learned by at least April 2000 that the property owners' association claimed ownership of land on "her" side of the fence. In late October 2002, she obtained a copy of the survey showing her property line. At that point, appellant knew the fence did not follow the property line and knew that respondents' disclosure statement did not refer to an encroachment in this location. She also had been damaged by the loss of control over the disputed area. Appellant's cause of action for breach of a contractual duty to disclose the encroachment thus accrued by October 2002, at the latest. Her complaint, filed more than four years later, was barred by the statute of limitations.

Because we conclude that appellant's cause of action for breach of contract was time-barred, we need not decide whether the trial court erred in finding that respondents did not breach the contract or in its evidentiary rulings.

*Attorney's Fees*

The real estate purchase agreement provides that the prevailing party in any litigation arising out of the contract is entitled to recover reasonable attorney's fees. It also includes an agreement to "MEDIATE ANY DISPUTE OR CLAIM ARISING BETWEEN [THE PARTIES] OUT OF THIS CONTRACT BEFORE RESORTING TO ARBITRATION OR COURT ACTION." The same paragraph provides: "IF ANY PARTY COMMENCES . . . [A] COURT ACTION. . . WITHOUT FIRST ATTEMPTING TO RESOLVE THE MATTER THROUGH MEDIATION, THEN IN THE DISCRETION OF THE . . . JUDGE, THAT PARTY SHALL NOT BE ENTITLED TO RECOVER ATTORNEY'S FEES EVEN IF THEY WOULD OTHERWISE BE AVAILABLE TO THAT PARTY . . . ."

Appellant filed her complaint on June 8, 2007 and simultaneously requested that respondents participate in a mediation. Respondents declined the request because appellant did not make it before she filed the complaint, as required by the contract. One year and \$121,100 in attorney's fees later, respondents prevailed at trial. The trial court granted their motion for attorney fees in its entirety.

Appellant contends the trial court should have denied the motion based on respondents' refusal to mediate. There was no error. The plain language of the contract required appellant to "mediate . . . before resorting to . . . court action." She did not. As a result, she waived enforcement of this provision. (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 848, p. 935.) Even if appellant was entitled to enforce the provision, she would still be required to demonstrate that the trial court abused its discretion when it awarded fees to respondents despite their failure to mediate. There can be no serious argument that an abuse of discretion occurred. Respondents incurred these fees solely because appellant refused to acknowledge that she waited too long to file her lawsuit. There is nothing arbitrary, capricious or

irrational about requiring appellant to pay the full cost of her intransigence. (*Estate of Gilkison* (1998) 65 Cal.App.4th 1443, 1448-1449.)

The judgment is affirmed. Costs to respondent.

NOT TO BE PUBLISHED.

YEGAN, Acting P.J.

We concur:

COFFEE, J.

PERREN, J.

Thomas P. Anderle, Judge  
Superior Court County of Santa Barbara

---

Lascher & Lascher, A Professional Corporation. Wendy C. Lascher and  
Eric R. Reed, for Appellant.

Robert B. Locke, for Respondents